

SEP 25 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARL JOSEPH MCCOUN,

Defendant - Appellant.

No. 02-30379

D.C. No. CR-02-00025-RFC

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submitted September 12, 2003**
Seattle, Washington

Before: HAWKINS, McKEOWN, and BERZON, Circuit Judges.

Carl Joseph McCoun (“McCoun”) used his daughter’s name and personal information without her authorization to obtain six credit cards in her name. McCoun

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** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

was charged with and pled guilty to identity theft in violation of 18 U.S.C. § 1028(a)(7). The district court departed upward seven levels in sentencing McCoun, relying on three bases suggested by the applicable sentencing guidelines. U.S.S.G. § 2B1.1 (2002). Application Note 15(A) of section 2B1.1: (1) the offense caused or risked substantial non-monetary harm, (2) the victim suffered substantial inconvenience related to repairing the victim's reputation or a damaged credit record, and (3) the defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.¹

There is an adequate factual basis in the record for the first two factors. Psychological harm is an example of non-monetary harm. McCoun should have been aware that his actions would potentially cause psychological harm to his daughter because of their past relationship, in addition to his recent breach of parental trust. Also, based on the daughter's victim impact statement, there is sufficient factual basis for the district court to have found that McCoun harmed his daughter's reputation and caused her substantial inconvenience.

There is, however, an insufficient factual basis for the district court's application of the third factor in this case. Because obtaining six credit cards does not constitute the procurement of "numerous means of identification" *and* an "essential

¹U.S.S.G. § 2B1.1 App. Note 15(A)(ii), (vii)(I), & (vii)(III).

[assumption] of [his daughter's] identity,” the application of Note 15(vii)(III) was improper.

Where we conclude that a district court based a departure on both valid and invalid factors, remand is required unless it is clear that the district court would have imposed the same sentence absent reliance on an invalid factor. United States v. Working, 287 F.3d 801, 809 (9th Cir. 2002) (citing Koon v. United States, 518 U.S. 81, 113 (1996)). Because it is unclear whether the district judge would have imposed the same departure relying only on the first two factors, we vacate the sentence and remand for resentencing.²

VACATED AND REMANDED.

²Accordingly, we need not address McCoun's claims that the departure resulted in double-counting for the crime or that the district court failed to explain the degree of its departure.